## APPENDIX A

### §1983. Civil action for deprivation or rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

**APPENDIX B**

NOT RECOMMENDED FOR PUBLICATION

NO. 97-5844

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA A. TURNER,

Plaintiff-Appellant

v.

RICHARD A. FREY, JR.

_____/

BEFORE: KEITH, DAUGHTREY, and COLE, Circuit Judges.

PER CURIAM. Plaintiff-Appellant Patricia A. Turner, the administrator of the estate of Stanley R. Shepherd, appeals the district court's grant of summary judgment in favor of all Defendant-Appellees as to all of her 42 U.S.C. § 1983 claims. The district court found that there was no genuine issue of material fact as to any of Plaintiff-Appellant's claims and granted



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summary judgment for the Defendants. For the reasons set forth below, the district court's judgment is **AFFIRMED.**

I.

Stanley Shepherd was arrested at 4:45 p.m. on August 17, 1990 by the Louisville Police and charged with theft. Shepherd was transported to the Jefferson County Jail where he was booked, and arraignment was set for the following day. At the jail, he was given a health screening by a nurse employed by Correctional Medical Systems, Inc.[1] ("CMS"), which indicated a history of epilepsy, suicidal tendencies with one suicide attempt, and two anti-seizure medications. The examining nurse determined that Shepherd was at risk of suicide, ordered that he be placed on suicide watch, and filled out a suicide observation watch form which was placed outside Shepherd's cell. Because of the risk of suicide, Shepherd was not given a blanket, sheet

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[1]CMS is a private inmate health services provider under contract with the defendant Jefferson County. CM
:ttled with the plaintiff along with six medical or nursing professionals employed by them and they have been
ssed from the case by agreed order of dismissal entered August 6, 1992. However, by order entered June 26,
the defendant Jefferson County defendants were granted leave to file a third party complaint against CMS bas
fferson County's contractual right of indemnification.



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or jumpsuit; he received only a paper gown.

A Suicide Observation Form was placed outside Shepherd's cell and he was to be monitored by jail personnel every ten minutes. The form stated that the inmate was to be observed for suicide precautions but did not indicate that Shepherd was to be observed for seizures or delirium tremors.

Shepherd's time in his cell was uneventful until approximately 4:25 a.m. the next day. Defendant Officer Harold Adams, while on his rounds, found Shepherd lying under his bunk, face down, with blood on the floor. Officer Adams immediately notified the medical staff, and Nurse Norene Ahart and Physician Assistant Zeke Cannon with CMS responded. As Shepherd was lifted off the floor and cleaned up, Norse Ahart observed that it appeared Shepherd had spread the blood on his face and hands. She did not see any blood on Shepherd's mattress. Nurse Ahart also testified that she saw Shepherd "picking at his nose," but no mention of this was made in her Extraordinary Incident Report.

As the bleeding had stopped by the time Shepherd had been cleaned up, Ahart did not direct that Shepherd be transferred to an outside medical institution because she did not believe the situation was life-threatening. Physician Assistant Cannon then ordered that Shepherd be placed on his back in loose four point restraints to keep him from picking at his nose. Cannon tripled a mattress and placed it behind Shepherd's back to put him in a semi-sitting position.

Sergeant Copple and Officers Browning, Durham and Adams were present at the time Shepherd was observed on the floor and were present during the institution of the restraint process. Browning and Durham applied the four point restraint in accordance with the direction of the medical staff. Adams did not participate in the application of the restraints.

At 6:15 that same morning, Officer Adams notified Physician Assistant Cannon and Nurse Steven Philips that Shepherd's nose was bleeding again. Cannon and Philips came to Shepherd's cell and Cannon packed his nose with a nasal pack

with instructions that the pack be kept in place for twenty-four hours.

At approximately 6:45 a.m. Shepherd asked to use the toilet and get a drink. Officer Adams released Shepherd from his restraints and allowed him to do so and then he replaced the restraints on Shepherd. Nurse Philips checked the restraints once Shepherd was again restrained. At 7:03 a.m. Officer Adams observed Shepherd on his side trying to throw up. Adams reported this to Physician Assistant Cannon, who directed Adams to place something on the floor so that Shepherd would not throw up on the floor. A few minutes after 7:00, Officer Adams was relieved by Officer Cornatzer. Officer Adams advised Cornatzer of the events that had taken place. Cornatzer then went to check on Shepherd and observed that Shepherd was breathing and not bleeding.

At 8:20 a.m. Officer Smith went to Shepherd's cell to advise him of what he needed to do to prepare for his arraignment. Smith observed Shepherd lying on his mattresses

in four-point restraints. Smith alleged that when he tried to speak to Shepherd, he shook his chains and appeared to behave disruptively. There is no indication that Officer Smith had been advised of previous night's events or of Shepherd's condition. Smith did not notice any bleeding from Shepherd's nose.

At 8:45 a.m. Nurse Swindler and Officer Cornatzer went to Shepherd's cell to check the restraints. Nurse Swindler observed that Shepherd's pulse was faint and Cornatzer activated the emergency alarm. Sergeant Johnson responded to the emergency alarm and promptly summoned EMS.

EMS arrived and administered aid to Shepherd but could not revive him. They transferred him to the hospital, but Shepherd died shortly thereafter. The post mortem examination revealed blood-stained gauze packing inserted into the nostrils and blood in the bronchial tubes. The medical examiner believed that Shepherd's cause of death was attributable to aspiration of blood with a history of seizure disorder. his opinion was that a restrained Shepherd was unable to clear blood from his

passages.

After Shepherd's death, the Jefferson County modified their policy of four-pointing prisoners to require that prisoners be four-pointed face down.

## II.

This Court reviews a district court's grant of summary judgment de novo. Barber v. City of Salem, Ohio, 953 F.2d 232, 235 (6th Cir. 1992). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex. Corp v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

## III.

In order to establish a right to relief under 42 U.S.C. § 1983, a plaintiff must plead and prove at least two elements: (1) that he has been deprived of a right secured by the

Constitution and laws of the United States; and (2) that the defendant deprived him of this right while acting under color of law. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155 (1978).

The constitutional provision which is the basis of the plaintiff's claim concerning supposedly inadequate medical care is the Eighth Amendment's prohibition against cruel and unusual punishment. The standard for determining whether the Eighth Amendment has been violated in cases alleging inadequate medical treatment of a prisoner was articulated in Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251, 260 (1976), when the Supreme Court wrote:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under Section 198. . . This conclusion does not mean,

> however, that every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.

A prison official is "deliberately indifferent" when under a subjective standard, he "knows of and disregards an excessive risk to inmates' health or safety. . ." Farmer v. Brennan, 114 S.Ct. 1970, 1979 (1994).

The plaintiff's case, as alleged, fails to present facts which would give rise to the "deliberate indifference" required of prison officials. When Shepherd was found lying on the floor of his cell, jail personnel picked him up, cleaned him up, and mopped the blood off the floor. They then, at the direction of the on-site medical officer, placed him on his back in loose four-point restraints, ostensibly to keep him from further harming himself. Shepherd was monitored throughout the night by prison officials. The medical personnel were alerted when Shepherd began bleeding from his nose again, at which time Physician Assistant Cannon and Nurse Philips packed Shepherd's nose with a nasal pack. Later, upon request, Officer

Adams allowed Shepherd to use the toilet and get a drink, and replaced the four-point restraints under the supervision of Nurse Philips. When Officer Adams observed Shepherd trying to throw up, he immediately alerted and followed the orders of Physician Assistant Cannon, who directed Adams to put something on the floor so that Shepherd would not throw up on the floor. When Adams' shift ended at 7:00 a.m., he advised his replacement, Officer Cornatzer, of the previous night's events. Officer Cornatzer then went and checked on Shepherd and observed that he was not bleeding and that he was breathing. At 8:30 a.m., Officer Smith went into Shepherd's cell and attempted to speak to Shepherd. In response, Shepherd shook his chains and appeared to behave in a disruptive manner. Officer Smith was making his rounds of the prisoners' cells that morning preparing them for arraignment. He had no way of knowing of the previous night's events or of Shepherd's condition. Officer Smith did not notice any bleeding from Shepherd's nose. At 8:45 a.m. Nurse Swindler and Officer Cornatzer went to

Shepherd's cell to check his restraints. When Nurse Swindler observed that Shepherd's pulse was faint, Officer Cornatzer immediately activated the emergency alarm and EMS was promptly summoned.

It should be noted that the guards followed the directions of the medical staff at all times. The four-point restraints were ordered by Physician Assistant Cannon and implemented by the guards under Cannon's supervision. The tripled mattresses placed under Shepherd's back were placed there by Cannon. The packing of Shepherd's nose was done by Physician Assistant Cannon. In short, there is no reason to think that the guards were deliberately indifferent to the serious medical needs of the prisoner as required by Estelle v. Gamble. They appear at all times to have reasonably relied upon the presence and judgment of the on site medical staff and do not appear to have possessed a sufficiently culpable state of mind to warrant a § 1983 claim.

**IV.**

Plaintiff has named as defendants the Jefferson County Corrections Department, the Jefferson County Fiscal Court, the County Judge/Executive and three Jefferson County Fiscal Court members in their official capacities. Because the above defendants were sued in their official capacity, it is as if plaintiff were suing Jefferson County itself. Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978). As the Court stated:

> "[A] local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom...inflicts the injury that the government as an entity is responsible under Section 1983."

Monell, 436 U.S. at 694.

The question of the municipality's policy is not a difficult one. It would be a stretch to believe that, as plaintiff claims, there was a policy (either explicit or implicit) in Jefferson County of deliberate indifference to the serious medical needs of prisoners. The events in the case at bar are clearly tragic, but

they do not support the plaintiff's position. In fact, the record shows that the guards summoned medical personnel several times and followed the instructions of the medical personnel to the letter.

The question of the County's liability as a result of the four-point restraint policy is also easily dispensed with. The plaintiff claims that the county policy concerning the four-pointing of prisoners was drafted in a grossly negligent and reckless manner, since injury to a patient bleeding nasally is readily foreseeable. However, the plaintiff's view is somewhat misguided. The jail personnel did not four-point Shepherd until told to do so by the on-site medical official, Physician Assistant Cannon, and then only under his supervision. The guards who four-pointed Shepherd were reasonably relying upon the advice of a trained medical specialist and are not, under Estelle principles, required to second-guess such recommendations in such instances.

The plaintiff's claim against the County for failure to

train must also fail. The record reveals that the Jefferson County Detention Center requires all correctional officers to receive basic health care training, including first aid. As a matter of policy, jail personnel does not interfere with medical decisions made by the medical staff. There is no indication that Shepherd's death is in any way attributable to any failure of the county to train its correctional officers.

V.

The plaintiff claims that there was a genuine issue of arterial fact as to whether Shepherd was assaulted and battered while confined. After being examined by outside medical personnel, Shepherd was found to have swelling on his nose that was consistent with a blow to his nose. The district court excluded this claim because it was not raised in the complaint, and the plaintiff seeks to have this Court consider the issue. In support of her claim, the plaintiff offers deposition testimony of aa medical examiner that Shepherd's injury was likely caused by a blow because, "individuals who are conscious and not

handicapped tend to evade their fall." Blood was first seen on Shepherd when he was found under his bunk. The defendants do not claim to know how or why Shepherd's nose began bleeding, but Nurse Ahart did testify to having seen Shepherd "picking at his nose." The plaintiffs speculate that the nosebleeds were caused by a blow to the nose administered by jail officials. The district court, however, properly determined that the question of whether Shepherd was struck on the nose is irrelevant to the issue of whether the defendants denied Shepherd adequate medical care, and so we do not reach this issue on appeal.

Fore the foregoing reasons, the grant of summary judgment by Judge Dixon of the United States District Court for the Western District of Kentucky is **AFFIRMED.**

**APPENDIX C**

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**
**CIVIL ACTION NO. C91-0532-L(D)**

**PATRICIA A. TURNER,** **PLAINTIFF**

**v.**

**RICHARD A. FREY, JR., ET AL.** **DEFENDANTS.**

**ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

Upon the response by the Jefferson County Defendants to the Plaintiff's motion for reconsideration, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the Plaintiff's motion for reconsideration is denied.

DATE: _____

_____
JUDGE
UNITED STATES DISTRICT COURT

**APPENDIX D**

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**
**Civil Action No. C 91-0532 L(D)**

**PATRICIA A. TURNER, PLAINTIFF,**

**VS.**

**RICHARD A. FREY, JR., et al., DEFENDANTS.**

**MEMORANDUM OPINION**

This is an action pursuant to 42 U.S.C. § 1983 alleging constitutional violations in connection with the death of Stanley A. Shepherd at the Jefferson County Jail on August 18, 1990. The defendants have moved for summary judgment (DN 122) the plaintiffs have responded thereto (DN 124) and the defendants have filed a reply (DN 126). The Court has considered the memoranda of the parties and relevant portions of the file and the matter is now ready for determination.

Mr. Shepherd was arrested on August 17, 1990 by the Louisville, Kentucky police. He was transported to the

Jefferson County Jail and was held in lieu of posting bail. The arrest occurred at 4:45 p.m. and at 6:00 p.m. he was given a health screening by a nurse with Correctional Medical Systems, Inc. ("CMS"), the private inmate health services provider under contract with the defendant Jefferson County. (CMS has settled with the plaintiff along with six medical or nursing professionals employed by them and they have been dismissed from the case by agreed order of dismissal entered August 6, 1992. However, by order entered June 26, 1996, the Jefferson County defendants were granted leave to file a third party complaint against CMS based on Jefferson County's contractual right of indemnification. That was the subject of a memorandum opinion (DN 105) which granted summary judgment to CMS but a subsequent order (DN 114) which vacated the summary judgment.)

During his health screening, Shepherd indicated a history of epilepsy, suicidal ideation with one suicide attempt and two current medications. The nurse decided that he was a high risk for suicide and ordered that he be placed on suicide precautions

with observation at ten minute intervals. She issued a suicide observation form which is posted outside the inmate's cell so it can be used by security staff to monitor the inmate. Shepherd's observation form directed that he have no blanket, sheet or jump suit and that he wear only a paper gown. It did not instruct that he was to be observed for seizures or delirium tremors.

Shepherd was continued on suicide observation and at 4:25 a.m. the next morning he was found by Officer Adams lying under his bunk face down with blood on the floor. Officers Browning and Durham were already in the unit attending to an unrelated inmate problem. Officer Adams immediately notified medical staff and nurse Norene Ahart and physician assistant Zeke Cannon with CMS responded. Sergeant Copple was also summoned. Nurse Ahart observed that Shepherd was bleeding from his nose and he had blood on his face, his hands and on his paper gown. By the time Shepherd was cleaned of the blood his nose bleeding had stopped. Nurse Ahart observed no signs of trauma although

Shepherd was seen picking at his nose. Nurse Ahart did not direct that Shepherd be transferred to an outside medical institution because she did not view the situation life threatening. Physician Assistant Cannon ordered that Shepherd be placed in very loose restraints to keep him from picking at his nose. Cannon tripled a mattress and placed it behind Shepherd's back to put him in a semi-sitting position. Shepherd's nose was not packed with gauze because the bleeding had stopped.

Sergeant Copple and Officers Browning, Durham and Adams were present at the time Shepherd was observed on the floor and were present during the institution of the restraint process. Browning and Durham applied the four point restraint in accordance with the directions of the medical staff. Adams did not participate in the application of the restraints.

At 6:15 a.m. the same morning Adams notified medical staff that Shepherd was again bleeding from his nose. Physician Assistant Cannon and Nurse Phillips responded by coming to Shepherd's cell. His nose was packed with a nasal pack with

directions that the pack be kept in place for 24 hours. Adams did not participate in the packing of Shepherd's nose.

At approximately 6:45 a.m. Shepherd asked to use the toilet and get a drink. Nurse Phillips returned and Officer Adams released Shepherd from his restraints. Nurse Phillips checked Shepherd's restraints once he was again placed in them.

The required ten minute observations were continued by Officer Adams. Officer Adams did not see Shepherd bleeding but he did observe him on his side trying to throw up at about 7:03 a.m. Officer Adams reported this information to physician assistant Cannon. Physician assistant Cannon's response to this observation was a request that Adams put something on the floor so that Shepherd would not throw up on the floor.

Officer Adams was relieved a few minutes after 7:00 a.m. by Officer Cornatzer. Officer Adams advised Officer Cornatzer of the events which occurred, including the fact that Shepherd was on suicide precaution observation and that he was in restraints. An in cell check was conducted and Officer

Cornatzer observed that Shepherd was not bleeding and that he was breathing. Officer Cornatzer conducted the observations and observed only that Shepherd had turned his head.

At about 8:20 a.m. Officer Smith, who was the court officer, went to Shepherd's cell to advise him of what he needed to do to prepare himself to go to court. Officer Smith observed Shepherd lying on what appeared to be mattresses behind his head and was in four point restraints. When Officer Smith attempted to speak with Shepherd, he shook his chains and appeared to behave in a disruptive manner. Therefore, Officer Smith left and attended to other business. Officer Smith last saw Shepherd when he passed back through the unit at 8:30 a.m. Officer Smith never noticed any bleeding from Shepherd's nose.

At about 8:45 a.m., Ms. Swindler, a registered nurse, accompanied by Officer Cornatzer, went to Shepherd's cell to check his restraints having received a prior briefing on the situation. When Ms. Swindler arrived, she observed no blood

or vomit although she noticed water on the floor. She did not get a response from Shepherd and felt a very faint pulse. She did not believe that Shepherd was dead because of a lack of certain symptoms. Officer Cornatzer activated the emergency alarm and Nurse Swindler left to get medical equipment and oxygen. Emergency treatment was started and emergency medical services was notified.

Sergeant Ed Johnson responded to the emergency alarm. He observed Shepherd lying on the bunk in four point restraints with a mattress rolled up under Shepherd's shoulders, Shepherd's nose was packed and taped. When Sergeant Johnson observed that Shepherd was not breathing, he contacted EMS.

The emergency medical service received a call at 8:47 a.m. The emergency medical service arrived at the jail at 8:45 a.m. At the time that the emergency medical service arrived Shepherd was receiving compressions but was not receiving ventilations because the oxygen cannula from the oxygen

canister was placed in Shepherd's mouth instead of his nose. They intubated Shepherd, began additional life saving procedures and subsequently transferred him to the hospital. The jail was notified by the hospital at 9:14 a.m. that Shepherd died.

A post mortem examination was conducted that afternoon and it revealed no single anatomic cause of death. The time of death was estimated at approximately four hours prior to the examination. The examination revealed blood stained gauze packing inserted into the nostrils. The medical examiner noted evidence of blood in the bronchial tubes. The medical examiner opined that Shepherd's cause of death was attributed to aspiration of blood with a history of seizure disorder. Notably, the medical examiner had been informed by the coroner that Shepherd was secured flat on his back by four point restraints. His opinion was that Shepherd, being restrained, was unable to clear the blood from his passages. The medical examiner also opined that the elevation of Shepherd's

head would have assisted in maintaining a clear airway.

The written contract between Jefferson County and CMS required that CMS provide comprehensive inmate health services to include 24 hour nursing coverage, health care evaluations and screenings, in-house infirmary care, emergency medical care and pharmacy services management. Pursuant to the terms of the contract CMS was required to assist Jefferson County Detention Center in developing a suitable program of health care training to Jefferson County Detention Center staff which included training in CPR, first aid, response to medical emergency or disaster and other topics. CMS was required under the terms of the contract to submit monthly statistical reviews of health services provided. Additionally, CMS was required to develop a quality assurance program that included working with a medical audit committee in developing a policy and procedure review.

In addition to the above described health services contract, Jefferson County also entered into a contract for the

services of a physician specialist whose responsibilities as a "responsible physician" included conducting sick calls, insuring 24 hour on-call medical coverage, participating in monthly meetings and reviewing and evaluating Jefferson County Detention Center's medical unit policies and procedures. Jefferson County further contracted with a secondary physician specialist to provide medical care, including sick call.

The policy and procedure of Jefferson County Detention Center required that all correctional officers receive training in health care. The training included first aid and CPR with additional medical related topics included into the basic academy training as determined by the physician. As a matter of policy, the Jefferson County Detention Center does not interfere with medical decisions of medical staff. The Jefferson County Department of Corrections considers it to be the medical staff's final determination as to when an inmate is restrained for medical reasons, whether an inmate should be transported to an outside hospital and an inmate's treatment plan. The corrections

staff may interact with the medical unit regarding treatment by the final judgment is by the medical staff.

At the time of the incident, Jefferson County Detention Center post order, four point restraints, provided that an inmate ordered to be placed in four point restraints by a supervisor, psychologist or medical staff would be restrained on his back on the bunk. Under CMS policy, medical restraints are approved by a physician. There had been no incident previous to the Shepherd incident where an inmate had died after being four pointed on his back.

In defense of the motion, the plaintiff contends that Shepherd was probably struck in the nose thereby causing the nose bleed. Plaintiff asserts that much of the factual evidence points to an assault and battery. Plaintiff argues that assault and battery violates the well established and clearly defined constitutional rights of the decedent. The plaintiff contends that a reasonable person under the facts could conclude that the defendants were deliberately indifferent to a serious medical

need of the decedent Shepherd. Further, plaintiff contends that the defendant Jefferson County's policy on four pointing violates § 1983 as does its failure to train its officers of the danger of this policy. Lastly, the plaintiff contends that voluntarily allowing the decedent Shepherd to remain unclothes while chained to the bunk violated his constitutional right to privacy. In regard to the pendent state law claims, plaintiff contends that all defendants are not part of the county and those sued in their individual capacities are still subject to suit under state law including the wrongful death state law action.

Plaintiff has named defendant Richard A. Frey, Jr. in his individual capacity. At the time the incident occurred defendant Frey was the Executive Director of the Jefferson County Department of Corrections. Defendants assert that to establish liability against a supervisory official, plaintiff must establish that the supervisor was somehow involved in the complained of unconstitutional conduct and that liability cannot be established based on the right to control or under a respondeat superior

theory of liability. Defendants argue that plaintiff cannot establish that defendant Frey was present when the incident occurred, or that he approved, encouraged or knowingly acquiesced to the alleged unconstitutional conduct. Defendants contend that plaintiff's allegations fail to state a claim against defendant Frey. Additionally, defendants contend that there is no evidence in the record that defendant Frey was deliberately indifferent to the medical needs of Shepherd. Furthermore, there is no evidence that defendant Frey was, as a supervisor, aware of an obvious, substantial risk to inmate safety when inmates with nose bleeds are restrained on their backs. Defendants contend that plaintiff's claims against defendant Frey should be dismissed.

Defendants Copple, Browning and Durham contend that plaintiff cannot establish that they were deliberately indifferent to Shepherd's serious medical needs in restraining him to his bunk. Defendants assert that the evidence in the record supports no inference that they acted deliberately in disregard of

an obvious need for medical attention. The officers contend that the record clearly establishes that they relied upon the presence and judgment of the medical staff. The four point restraining of Shepherd subsequent to packing of his nose was at the instruction of the trained medical professionals. Defendants Copple, Browning and Durham contend that they are entitled to summary judgment because there is no evidence in the record to support a finding that they acted with a sufficiently culpable state of mind to satisfy the subjective component of the Eighth Amendment.

The defendants Adams and Cornatzer contend that plaintiff cannot establish that they were deliberately indifferent by failing to monitor Shepherd.

The defendant Smith apparently is not the subject of any specific allegation. He contends there is no support in the record to establish any liability on his part inasmuch as he simply went to Shepherd's cell to inform him of the need to prepare to go to court and that therefore there is no evidence in the record

that he was subjectively and deliberately indifferent to Shepherd's medical needs. Alternatively, defendant Smith contends that he is entitled to qualified immunity.

The defendants Frey, Copple, Browing, Durham, Adams, Cornatzer and Smith alternatively argue that they are entitled to qualified immunity in that plaintiff did not have a clearly established constitutional right under Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976). They contend that these officers are not required under the constitution to determine the seriousness of the medical need or to second guess treatment where medical personnel have exercised professional judgment and that they have no responsibility to interfere with the medical care secured.

Lastly, the defendants Jefferson County Corrections Department, the Jefferson County Fiscal Court and the County Judge/Executive and the three Jefferson County Fiscal Court Members who are named in their official capacities contend they should be dismissed inasmuch as the suit against them is in

essence a suit against Jefferson County, a governmental entity which cannot be held liable in a § 1983 action unless the plaintiff proves that the unconstitutional conduct complained of was the result of a policy or custom of the governmental entity. These defendants contend that first the municipal liability claim should be dismissed because plaintiff has failed to establish that there was conduct of the individual officials amounting to a deliberate indifference to the decedent's medical needs. Secondly, and assuming such unconstitutional conduct, these defendants contend that plaintiff cannot establish a policy or custom of the County of deliberate indifference to inmates' serious medical needs.

With respect to plaintiff's right to privacy claim, the defendants contend that the evidence indicates Shepherd was placed in a paper gown prior to being placed in the cell. Defendants contend that the evidence shows that after Shepherd was found lying on the floor beneath his bunk he was cleaned up and the gown was replaced. According to defendants, plaintiff

merely claims that some time prior to transportation to the hospital Shepherd was nude. Defendants argue that inmates do not retain a right of privacy under the Fourth Amendment. Furthermore, under the substantive due process guarantees under the Fourteenth Amendment, plaintiff cannot establish a constitutional deprivation. Therefore defendants contend that they are entitled to summary judgment on the claim.

Finally, defendants contend that since they are entitled to summary judgment as to all plaintiff's federal claims, the Court should dismiss the state law claims without prejudice. Defendants also contend that the state law claims against the Jefferson County entities and the individual defendants, to the extent they are named in their official capacities, should be dismissed under the Kentucky doctrine of sovereign immunity. The defendants contend that inmates do not retain a right of privacy.

In their reply memorandum defendants contend that plaintiff's response to the motion for summary judgment does

not indicate that there are genuine issues of material fact as to whether the Jefferson County defendants denied Shepherd adequate medical care. As a result, defendants claim they are entitled to judgment as a matter of law. Defendants object to plaintiff's assertion of the state law claim of assault and battery in the response memorandum because that issue was not set forth within plaintiff's complaint. Defendants assert that the complaint only concerns whether Shepherd was denied adequate medical care while incarcerated at the Jefferson County Jail. Defendants assert that by order entered November 15, 1995 the Court granted defendant's motion in limine which precludes plaintiff from introducing evidence that the jail officials or employees struck plaintiff (see DN 96).

Defendants contend that the argument set forth within plaintiff's response memorandum ignores the uncontroverted fact that Shepherd was restrained on his back in spite of his nose bleeding condition pursuant to the directive of medical staff and in the presence of medical staff. Defendants contend that

plaintiff's argument also ignores the fact that medical staff packed Shepherd's nose knowing that he would be restrained on his back. Defendants contend that plaintiff's argument that Jefferson County is liable for failing to rain its staff on restraining an individual with a nose bleed, and for recklessly drafting a policy on restraints, is "nonsensical because medical staff was present at the time the restraints were applied, and medical staff monitored inmate Shepherd while he was in restraints." (DN 126, p. 6).

## CONCLUSIONS OF LAW

According to Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." See Canderm Pharmacal, Ltd. V. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988). The moving party bears the burden of demonstrating the absence of a genuine issue of

material fact. Cellotex Corp. V. Catrett, 477 U.S. 317, 324 (1986). We must look to the substantive law controlling this case to identify which facts are material for summary judgment analysis. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (citations omitted).

The moving party's burden may be discharged by demonstrating an absence of evidence to support an essential element of the nonmoving party's case for which he or she has the burden of proof. Cellotex Corp., 477 U.S. at 323. Once the moving party demonstrates this lack of evidence, the burden passes to the nonmoving party to establish, after an adequate opportunity for discovery, the existence of a disputed factual element essential to his or her case with respect to which he or she bears the burden of proof. Id. If the record taken as a whole could not lead the trier of fact to find for the nonmoving party, the motion for summary judgment should be granted. Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence is merely colorable, or is not

significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50.

The Sixth Circuit in Street v. J.C. Bradford & Co., indicated that the following principles have been established by the "new era" of summary judgment practice in the federal courts:

> 1. Complex cases are not necessarily inappropriate for summary judgment.
>
> 2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
>
> 3. The movant must meet the initial burden of showing "the absence of genuine issue of material fact" as to an essential element of the non-movant's case.
>
> 4. This burden may be met by pointing out to the court that the respondent having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
>
> 5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: "whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

6. As on federal directed verdict motions, the "scintilla rule" applies, *i.e.*, the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of a material fact.

10. The trial court has more discretion than in the "old era" in evaluation the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, [w]here the record taken as a whole could not lead the rational trier of fact to find" for the respondent, the motion should be granted. The trial court

> has at least some discretion to determine whether the respondent's claim is implausible."

Street, 886 F.2d 1479-1480 (6th Cir. 1989) (citations omitted).

In order to establish a right to relief under 42 U.S.C. Section 1983, a plaintiff must plead and prove at least two elements: (1) that he has been deprived of a right secured by the Constitution and laws of the United States; and (2) that the defendant deprived him of this right while acting under color of law. Flagg Brothers, Inc. V. Brooks, 436 U.S. 149 (1978).

The constitutional provision which is the basis of the plaintiff's claim concerning supposedly inadequate medical care is the Eighth Amendment. The standard for deciding whether the Eighth Amendment has been violated was stated as follows:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the

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[1]Plaintiff's response to the motion for summary judgment attempts to raise an issue of whether Mr. Shepherd's nose bleed was caused by physical abuse. However, the complaint only alleges the denial of adequate medical care while incarcerated at the Jefferson County Jail. Defendants have objected. The undersigned agrees with defendants that the question of whether Mr. Shepherd was struck on the nose is irrelevant to the issue of whether defendants denied him adequate medical care.

> indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under Section 1983.

Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251, 260 (1976) (citations and footnotes omitted). These standards were explained further by the Supreme Court stating that the action must be "characterized as . . . repugnant to the conscience of mankind." 429 U.S. at 105, 97 S.Ct. 285, 50 L.Ed.2d 251. Essentially the same standard applies to pretrial detainees. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244-46, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983).

The threshold element of this Eighth Amendment claim is that there must be "a serious medical condition" that must be obvious to correctional officers. The courts in this Circuit require a showing that the prisoner's medical condition be not

only serious, but requiring immediate medical attention. Inmates, Washington County Jail v. England, 516 F.Supp. 132, 139 (E.D. Tenn.), aff'd, 659 F.2d 1081 (6th Cir. 1981). Moreover, other courts have noted that "[a] 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." Laaman v. Helgemoe, 437 F.Supp. 269, 311 (D.N.H. 1977) (citations omitted).

When a prisoner has received some medical attention and the dispute centers upon the adequacy of his treatment, the federal courts will not second guess medical judgments to constitutionalize claims which are more properly raised under state tort law. Westlake v. Lucas, 537 F.2d 857, 860, n.5 (6th Cir. 1976). See also Molton v. City of Cleveland, 839 F.2d 240, 243 (6th Cir. 1988), cert. Denied, 489 U.S. 1068 (1989). Further, in this Circuit, the allegedly unconstitutional act must demonstrate deliberateness "tantamount to an intent to punish."

Molton, 839 F.2d at 243 (emphasis added).

"The Eighth Amendment does not require that the medical care be the best available nor does it protect inmates from isolated incidents of improper diagnosis and treatment." Grubbs v. Bradley, 552 F.Supp. 1052 (M.D.Tenn. 1982). Plaintiff must show that he suffered from a serious disease or injury, that there was a substantial potential for harm if medical care was delayed or denied, and that such harm did result. Westlake v. Lucas, supra. Similarly, where a state prisoner was incarcerated for a period in a county jail and there was no support for the conclusions that the unavailability of medicines prescribed by the state prison doctor caused him to suffer lasting damage to his health or that any pain he suffered was consciously inflicted by defendants solely to punish him, the plaintiff was held not to have a claim under 42 U.S.C. Section 1983. Russell v. Enser, 496 F.Supp. 320 (D.S.C. 1979), aff'd, 624 F.2d 1095 (4th Cir. 1980).

Plaintiff has sued defendant Richard A. Frey, Jr. in his

individual capacity. At the time that the incident occurred defendant Frey was the Executive Director of the Jefferson County Department of Corrections. The undersigned noes that the Doctrine of Respondeat Superior does not apply in Section 1983 lawsuits to impute liability onto supervisory personnel. Taylor v. Michigan Dept. of Corrections, 69 F.3d 76, 80-81 (6th Cir. 1995); Walton v. City of Southfield, 995 F.2d 1331, 1340 (6th Cir. 1993). In order to find a supervisor liable a plaintiff must allege that the supervisor condoned, encouraged or knowingly acquiesced in the alleged misconduct. Taylor, 69 F.3d at 80-81; Walton, 995 F.2d at 1340. Defendants have demonstrated a lack of evidence to show that defendant Frey either condoned, encouraged or knowingly acquiesced in the alleged incident. Further, defendants have demonstrated a lack of evidence to support plaintiff's contention that defendant Frey failed to properly set policy and failed to supervise or train the corrections officers and medical personnel to properly care for Shepherd's medical needs. The burden passed to plaintiff to

establish the existence of a disputed fact essential to these issues. Cellotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). However, plaintiff failed to demonstrate the existence of a disputed fact on these issues.

In regard to defendants Copple, Browning, Durham, Adams, Cornatzer and Smith the key facts herein do not indicate deliberate indifference by defendants to the medical needs of Shepherd. In each instance when a serious medical condition was obvious to the defendant officers the appropriate steps were taken to arrange medical treatment. All acts by the above Officers were at he direction and supervision of trained medical personnel. It would be contrary to the principles set forth in Estelle to require the defendant Officers to second guess the judgment of the medical staff. See, Estelle v. Gamble, 429 U.S. 97, 104-105 (1976).

Since the undersigned finds that the above defendants were not deliberately indifferent to the medical needs of Shepherd there is no Eighth Amendment violation. Therefore

the undersigned need not determine whether the officers are protected by qualified immunity.

Plaintiff has named as defendants the Jefferson County Corrections Department, the Jefferson County Fiscal Court, the County Judge/Executive and three Jefferson County Fiscal Court members in their official capacities. Because the above defendants were sued in their official capacities, it is as if plaintiff is suing Jefferson County. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). As the Court stated in Monell:

> "[A] local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy are custom...inflicts the injury that the government as an entity is responsible under Section 1983."

Monell, 436 U.S. at 694.

The United States Supreme Court further elaborated on this standard in City of Oklahoma City v. Tuttle, 471 U.S. 808, 85 L.ed.2d 791, 105 S.Ct. 2427 (1985), reh'g denied, 473 U.S. 925, 87 L.Ed.2d 695, 106 S.Ct. 16 (1985). Therein, the court

stated:

> In the first place, the word 'policy' generally implies a course of action consciously chosen from among various alternatives; . . . some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any such harm inflicted by a municipal official; . . . [b]ut Monell must be taken to require proof of a city policy . . . before a claim can be sent to a jury on the theory that a particular violation was 'caused' by the municipal 'policy.' At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

Tuttle, 471 U.S. at 823, 85 L.Ed.2d at 04, 105 S.Ct. at 2436 (emphasis added).

The Supreme Court held that a municipality can be held liable under 42 U.S.C. Section 1983 for constitutional violations caused by its official policies, including unwritten customs. Id. 15 691. However, as clearly set forth in Monell and other cases such as Wells v. City of Carrollton, 678 F.Supp. 632 (N.D.Tex. 1988),

> "to recover under this cause of action, plaintiff must plead and prove that defendants' employees acted (1) in conformity with an official policy adopted by defendant's lawmaking or policy making officials, or (2) pursuant to a persistent, widespread practice that is so common and well-settled as to constitute a custom which represents municipal policy attributable to defendants' policy making authority." (Emphasis added) Citing Bennett v. City of Slidell, 735 F.2d 861 (5th Cir. 1984). See also 81 ALR Fed 549.

A single incident does not meet the custom or policy requirement necessary to hold the municipality liable under 42 U.S.C. 1983. In Strauss v. Chicago, 760 F.2d 765 (7th Cir. 1985), the Court of Appeals held "Proximate causation between the municipality's policy or custom and the plaintiff's injury must be present." "We affirm the lower court's dismissal of Strauss' complaint for failure to state a claim because he has alleged no facts to suggest that the policies of which he complains actually exists." And furthermore, the court stated with regard to the issue of custom, "Nothing in the complaint suggests that the incident was other than an isolated one unrelated to municipal

policy, leading us to affirm the dismissal of the complaint." Id. at 766.

Plaintiff has failed to establish that there was conduct by the individual officers amounting to a deliberate indifference to Shepherd's medical needs. In the absence of an underlying constitutional deprivation, plaintiff has no constitutional claim against Jefferson County. See City of Los Angeles v. Heller, 475 U.S. 796 (1986).

Plaintiff has also failed to establish the existence of a policy or custom of deliberate indifference to inmates with serious medical needs. The policy and procedure of the Jefferson County Detention Center requires all correctional officers receive health care training, including first aid. As a matter of policy the Jefferson County Detention Center requires all correctional officers receive health care training, including first aid. As a matter of policy the Jefferson County Detention Center officers do not interfere with medical decisions by the medical staff. The medical staff provided medical care,

determined that transfer to an outside hospital was not necessary, ordered that Mr. Shepherd should be restrained and then supervised the application of the four point restraint system. There is no evidence that a failure to train the defendant officers was a proximate cause of Shepherd's death.

Plaintiff alleges a violation of Mr Shepherd's right to privacy in connection with a claim that Mr. Shepherd was left lying nude on his bunk in his cell. The cause for invasion of privacy is based upon the right of an individual to be left alone and to be free from unwarranted interference from the public in matters in which they are not necessarily concerned. McCall v. The Courier Journal & Louisville Times, 623 S.W.2d 882, cert. denied, (Ky. 1981), 456 U.S. 975 (1982; Wheeler v. Sorensen Manufacturing Co., 415 S.W.2d 582 (Ky. App. 1967). However, this right to privacy is not absolute. Wheeler, 415 S.W.2d at 585.

The basic principles of the tort of invasion of privacy are set forth in the Restatement (Second) of Torts Section 652(A).

See McCall, 623 S.W.2d at 887. In order to state a cause of action for invasion of privacy, the plaintiff must show actual malice. Yancy v. Hamilton, 786 S.W.2d 854 (Ky. 1989). Thus, absent a showing of actual malice, plaintiff has no cause of action for invasion of privacy. Defendants have demonstrated a lack of evidence of actual malice and plaintiff has failed to establish the existence of a disputed factual element essential to this issue.

The Sixth Circuit has indicated that trial courts should not retain jurisdiction over pendent state law claims when the federal claims have been dismissed before trial. Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 v. Commercial Property Services, Inc., 755 F.2d 499, 506n.9 (6th Cir.), cert. denied, 474 U.S. 850 (1985). Dismissal of the pendent state law claims is required once the federal claim is dismissed. Id., See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966); Kurz v. Michigan, 548 F.2d 172, 175 (6th Cir.), cert. denied, 434 U.S. 972 (1977); Gibson

v. First Federal Savings and Loan Ass'n. of Detroit, 504 F.2d 826, 830-831 (6th Cir. 1974). Dismissal of the state law claims on their merits would be inappropriate. Local No. 47, 755 F.2d at 506. The proper approach is to dismiss the state law claims without prejudice for want of jurisdiction. Id. Since defendants are entitled to summary judgment as to all of plaintiff's federal claims then the state law claims should be dismissed without prejudice.

Summary judgment shall be entered consistent with this Memorandum Opinion.

This _____ day of February, 1997.

JOHN M. DIXON, JR.
UNITES STATES MAGISTRATE JUDGE

Copies:
Counsel

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**
**CIVIL ACTION NO. C91-0532-L(D)**

**PATRICIA A. TURNER,** **PLAINTIFF**

**v.**

**RICHARD A. FREY, JR., ET AL.** **DEFENDANTS.**

**ORDER**

For the reasons set forth in the Memorandum Opinion entered this date, it is hereby **ORDERED** that summary judgment is entered in favor of the defendants and against plaintiff as to all the plaintiff's 42 U.S.C. § 1983 claims. Fed.R.Civ.P. 56. Further, plaintiff's remaining state law claims are dismissed without prejudice for want of jurisdiction. This is a final and appealable order and there is not just reason for delay.

This 26th day of February, 1997.

JOHN M. DIXON, JR.
UNITED STATES MAGISTRATE JUDGE